Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EDWARD D. OPALEWSKI and PETER SIMAKAS,

Petitioners,

v.

RICHARD and DOROTHY FITZPATRICK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE SIXTH CIRCUIT ERR IN HOLDING THAT PETITIONERS' RIGHTS TO POSTDEPRIVATION DUE PROCESS WERE VIOLATED WHEN THE CITY ORDINANCE AND STATE LAW PROVIDED ADMINISTRATIVE AND JUDICIAL REVIEWS OF CONDEMNATION DECISIONS?

PARTIES TO THE PROCEEDING

The parties are Petitioners/Defendants, Edward D. Opalewski and Peter Simakas. The Respondents/Plaintiffs are Richard Fitzpatrick and Dorothy Fitzpatrick ("the Fitzpatricks").

The City of Dearborn Heights, which was a defendant in the district court, is not a party to this petition although its defense will most certainly be affected by this decision.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in Appendix at 1a. The Opinion of the District Court in *Fitzpatrick v. City of Dearborn Heights*, 97-73020 is contained in Appendix at 9a.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals was filed on July 15, 2004. A timely Petition for Rehearing En Banc was denied by Order filed on September 17, 2004. (App. 49a). The underlying action arose under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the district court's jurisdiction was based on 28 U.S.C. § 1331. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

The Fourteenth Amendment to the United States Constitution provides that:

> No state shall . . . deprive any person of life, liberty, or property without due process of law.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, suggests, or causes to be subjected, any citizen of the Under States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

MCL 125.542 Provides:

Sec. 142. An owner aggrieved by a final decision or order of the legislative body or the board of appeals under Section 141 may appeal the decision or order to the circuit court by filing a petition for an order of superintending control within 20 days from the date of the decision.

Dearborn Heights City Ordinance provides as follows:

Sec. 7-482. Hearing.

Any person affected by any notice which has been issued in connection with the enforcement of any provision of this article, or of any rule or regulation adopted pursuant thereto, may request and shall be granted a hearing on the matter before either the zoning board of appeals or the building board of appeals; provided that such person shall file in the office of the building and engineering department a written petition requesting such hearing and setting forth a brief statement of the grounds therefor within ten (10) days after the date the notice was served. Upon receipt of such petition, either the zoning board of appeals

or the building board of appeals shall set a time and place for such hearing and shall give the petitioner written notice thereof. At such hearing, the petitioner shall be given an opportunity to be heard and to show why such notice should be modified or withdrawn. The hearing shall be commenced not later than ten (10) days after the day on which the petition was filed; provided, that upon application of the petitioner, the zoning or building board of appeals may postpone the date of the hearing for a reasonable time beyond such ten-day period, if in the judgment of the board the petitioner has submitted a good and sufficient reason for such postponement.

Sec. 7-483. Action by appeals board.

(a) After a hearing, the zoning or building board of appeals shall sustain, modify or withdraw the notice, depending upon its findings as to whether the provision of this article and of the rules and regulations adopted pursuant thereto have been complied with. If the board sustains or modifies such notice, it shall be deemed to be an order of the board. Any notice serviced pursuant to section 7-482 shall automatically become an order if a written petition for a hearing is not filed in the office of the building and engineering department within ten (10) days after such notice is served.

(b) After a hearing in a case of any notice suspending any permit or certificate of occupancy required by this article or by any rule or regulation adopted pursuant thereto, when such notice has

been sustained by the zoning or building board of appeals, the permit or certificate shall be deemed to have been revoked. Any such permit or certificate which has been suspended by a notice shall be deemed to be automatically revoked if a petition for hearing is not filed in the office of the building and engineering department within ten (10) days after such notice is served.

Sec. 7-485. Emergency measures.

Whenever the director of building and engineering or the fire chief finds that an emergency exists which requires immediate action to protect the public health, he or she may, without notice or hearing, issue an order reciting the existence of such an emergency and requiring that such action be taken as he or she deems necessary to meet the emergency. Notwithstanding the order provisions of this article, such order shall be effective immediately. Any person to whom such order is directed shall comply immediately, but, upon petition to the mayor, shall be afforded a hearing as soon as possible. After such hearing, depending upon the finding as to whether the provisions of this article and of the rules and regulations adopted pursuant thereto have been complied with, such order shall be continued or may be modified or revoked.

Sec. 7-702. Appeals.

The property owner aggrieved by any final decision or order of the demolition board of appeals under Sec. 7-701 may appeal the decision or order to the circuit court by filing a petition for order of superintending control within twenty (20) days from the date of the decision.

Sec. 7-701.

(a) The City hereby declares the formation of a demolition board of appeals pursuant to Public Act 1917 No. 167, 141c, as amended by Public Act 1992 No. 144, effective March 31, 1993.

STATEMENT OF THE CASE

Plaintiffs and Respondents (hereinafter "Plaintiffs" or "the Fitzpatricks") sued the City of Dearborn Heights and city officials, Opalewski and Simakas, alleging that Defendants violated their civil rights during a condemnation action. Specifically, Plaintiffs' complaint alleged that Defendants condemnation of their home, which prevented occupancy until the Plaintiffs allowed a building inspection to be completed, without predeprivation notice and hearing, violated their constitutional rights to due process. The home was never demolished, still stands today and is still owned by the Plaintiffs.

Defendants filed a motion to dismiss. On February 27, 1998, the District Court granted Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Fitzpatricks filed an appeal of the District Court's order of dismissal.

On appeal, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. The Court of Appeals determined that the fact

that Plaintiffs had pled in their amended complaint the absence of emergency by contending that their home posed no serious health or safety hazard created a threshold issue for the district court that could not be decided under 12(b)(6) motion. Therefore, a factual finding was necessary before crossing the threshold.

On March 28, 2000, the Defendants' filed a motion for summary judgment on the ground that Defendant Opalewski and Simakas were entitled to qualified immunity. The District Court denied the motion and the Defendants' appealed. This Sixth Circuit held that it lacked jurisdiction over the case because, based on the record that did not include a written opinion by the District Court, the Defendants had not shown that the District Court's decision was based on the purely legal resolution of the issue of qualified immunity (which is immediately appealable) as opposed to the existence of a material fact requiring a resolution by a fact finder.

Upon remand, the District Court granted summary judgment to Defendants Opalewski and Simakas on grounds of qualified immunity as to the lack of predeprivation notice and hearing. The District Court found that the facts leading to the condemnation of the Plaintiff's home, including the citizen complaint, the damaged physical state of the home and its contents strewn on the lawn, the uninhabited state of the home, and the high level of crime in the surrounding neighborhood, were such that it could not be said that no reasonable officer could conclude that condemnation was appropriate. Thus, the District Court determined that the Defendants were entitled to qualified immunity for the decision to condemn the home without predeprivation process even if the Defendants were mistaken and no real emergency existed.

The Plaintiffs then filed a motion for reconsideration and the District Court agreed with Plaintiffs that they had an outstanding claim of inadequate postdeprivation process. The parties filed cross motions for summary judgment on the postdeprivation process. The District Court denied the Defendants' motion for summary judgment, but granted Plaintiff's motion for summary judgment. The District Court found as a matter of law that the City's procedures for postdeprivation process were inadequate and unconstitutional and directed that a trial be held on damages only. The District Court also found that the Defendants Opalewski and Simakas were not entitled to qualified immunity.

The Defendants appealed the order denying their motion for summary judgment on the ground of qualified immunity. A two-judge majority of the Sixth Circuit affirmed the district court order denying Defendants' qualified immunity. The court determined that the Defendants violated Plaintiffs' rights to postdeprivation due process because:

1) The process offered by the Defendants was different from the one prescribed by City Ordinance § 7-485. The court explained that Plaintiffs were required to obtain a hearing before the demolition board of appeals when the governing city ordinance plainly provides for a hearing before the mayor.

2) Plaintiffs were required to pay a $200.00 fee to obtain a hearing to which they are statutorily entitled.

3) The postdeprivation process was not immediate.

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted Because The Opinion Below Conflicts With Decisions In Other Circuits.

42 U.S.C. § 1983 allows individuals to recover from deprivation of constitutional rights that occur under color of state law. Qualified immunity, however, shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1983).

In ruling on a qualified immunity defense, the court considers two questions. First, the court must determine whether the record, viewed most favorably to the Plaintiff, establishes that the officer's conduct violated a constitutional right. Second, the court must determine whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

A. Right To Administrative Hearing And Judicial Review.

The Sixth Circuit's holding that the Fitzpatricks' post-deprivation due process rights were violated is clearly erroneous because they had available to them administrative and judicial reviews of the condemnation decision. This decision is also in direct conflict with decisions in other circuits. The other circuit courts have held that there is no procedural or due process violation where administrative decisions may be appealed to the state courts. *Herwins v. City of Revere*, 163 F.3d 15 (1st Cir. 1998); *Myrick v. City of*

Dallas, 810 F.2d 1382 (5th Cir. 1987) (a plaintiff cannot dispute the adequacy of post-deprivation remedies if she could have appealed the decision on her termination to the state court.); *Cohen v. City of Philadelphia*, 736 F.2d 81, 86 (3d Cir.), *cert. denied*, 469 U.S. 1019, 105 S. Ct. 434, 83 L. Ed. 2d 316 (1984) ("We thus join the First and Seventh circuits in holding that substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary.").

In *Herwins*, city officials issued an order to the owner and tenants to vacate the building forthwith due to a finding upon inspection that the building was unfit for human habitation. The owner brought an action alleging procedural due process violation due to lack of notice and hearing prior to the closure of the building. In holding that plaintiff's due process rights were not violated due to the existence of adequate postdeprivation process, the Court stated:

> Herwins' alternative argument is that the City did not provide an adequate post-deprivation remedy. It is *undisputed that Herwins could have challenged the shut-down by appealing the order to the City of Revere Board of Health and, if dissatisfied with its decision, could have appealed the ruling to the state courts*. Mass. Regs. Code tit. 105, §§410.850, 410.860. This is a conventional regime for redressing administrative error . . . *Herwins*, 163 F3d at 19.

(Emphasis added).

The Court in *Herwins* further noted:

> When one steps back, *Herwins* plainly could have taken an immediate appeal on the emergency shut-down and shown that the heat had been turned back on and that the other violations were not threatening to health. This would have meant a brief inconvenience to *Herwins* and the tenants but it would likely have led to a prompt cancellation of the emergency closure. The idea that *Herwins* could ignore this state provided procedural remedy, and then create a federal case and collect $55,000 damages for a denial of procedural due process, just makes no sense. *Id* at 20.

The situation in *Herwins* is strikingly similar to that presented in this case. The Plaintiffs in this case have the right to appeal the order of condemnation and the notice of intent to demolish to the demolition board of appeals (DBA) pursuant to Sections 7-701 of the City Ordinance. They must file a petition requesting a hearing which would be granted within ten (10) days. Thereafter, if they are dissatisfied with the decision of the DBA, they could appeal to the state circuit court under the City Ordinance Sec. 7-702 and state statute MCL 125.542. The ultimate postdeprivation process is judicial review which is provided by the state statute and the City Ordinance. Therefore, there was no violation of the Plaintiffs' rights to postdeprivation process and Defendants were improperly denied qualified immunity. Plaintiffs cannot ignore the postdeprivation procedure provided by the city and then assert a claim for a denial of due process. *See Myrick, supra* (a plaintiff cannot skip an available state remedy and then argue that the deprivation by the state was

the inadequacy or lack of the skipped remedy). Irrespective of whether the Plaintiffs could or should have gone before the mayor for a hearing or the demolition board of appeals, the Plaintiffs had an opportunity for a hearing *and* an appeal to the state courts.

B. Payment Of $200.00 Fee.

With regard to the requirement of a $200.00 fee for filing an appeal, the law does not clearly establish that such a requirement violates due process. The case cited by the district court in support of its ruling, *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 988, 28 L. Ed. 2d 113, (1971) only held that due process prohibits a state from denying, solely because of inability to pay court fees and costs, access to its court to **indigents.** In that case, this court noted:

> There is no dispute as to the inability of the named Appellants in the present case to pay either the court fees required by statute or the costs incurred for the service of process. The affidavits in the record establish that appellants' welfare income in each instance, barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce. 401 U.S. at 372-73.

In this case, the record is devoid of any evidence that the Plaintiffs are indigent or that they are unable to pay the $200.00 fee. Thus, the court was incorrect in its conclusion that "a reasonable person would find it objectively unreasonable to require the Fitzpatricks to pay $200.00 to obtain a hearing."

The Sixth Circuit also erroneously concluded that "a reasonable person would also find it objectively unreasonable to provide a hearing before the Demolition Board of Appeals when the governing city ordinance plainly provides for a hearing before the mayor." This court has made it clear that the failure to comply with state or federal regulations does not necessarily deprive governmental officials of qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984) (officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provisions.). Further, a state's failure to follow its own procedural regulations does not establish a violation of due process. *Jackson v. Cain*, 864 F.2d 1235, 1251 (5th Cir. 1989). Moreover, all that due process requires is notice and opportunity to be heard. In this case, Defendants gave notice to the Plaintiffs of their right of an administrative review and an opportunity to be heard before the Demolition Board of Appeals. There is no evidence that a hearing before the DBA is qualitatively different than a hearing before the mayor. The same relief or remedy obtainable from the mayor could have been obtained from the DBA and from the state circuit court.

C. Immediate Postdeprivation Hearing.

The majority noted that "under § 7-485, a person contesting an emergency condemnation, is entitled to petition the mayor for a hearing which is to be afforded **as soon as possible**." The record establishes that the Fitzpatricks were advised of their right to an administrative hearing before the DBA and informed that a hearing would be scheduled within two or three weeks. No court has imposed time restrictions as due process is not an inflexible concept. However, in *Cleveland Board of Education v. Ludermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), this court held that the due process requirement that a

hearing be held at a "meaningful time" was not violated by a 9-month delay in finally adjudicating a dismissed employee's administrative appeal. *Id.* at 547. The courts have held that extraordinary long delays may render a postdeprivation remedy inadequate. *See Cronin v. Town of Amesbury*, 81 F.3d 257, 260 (1st Cir. 1996); *Alton Land Trust v. Town of Alton*, 745 F.2d 730, 732 (1st Cir. 1984). However, the two-week delay in this case does not amount to extraordinary long delay. There is, in fact, absolutely no case law to suggest that a mere two week period of time for an appropriate appeal comes close to a violation of the U.S. Constitution's guarantee of due process of law. It is therefore, error for the court to conclude that the Fitzpatricks were denied immediate and meaningful postdeprivation process.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. The Sixth Circuit's opinion in this case conflicts with the decisions of other circuit courts. Even if the Petitioners failed to follow the procedures prescribed by the City Ordinance when Respondents were required to obtain a hearing before the DBA and not the mayor, the Respondents had the right to appeal to the state courts. The right to judicial review has long been recognized as adequate postdeprivation remedy. Moreover, a two-week delay in having a hearing is not sufficient to render the postdeprivation remedy offered by the Petitioners constitutionally inadequate or a violative of due process.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 15, 2004

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-1180

RICHARD FITZPATRICK and
DOROTHY FITZPATRICK,

Plaintiffs-Appellees,

v.

CITY OF DEARBORN HEIGHTS, a municipal corporation, EDWARD D. OPALEWSKI, individually and in his capacity as Director of the City of Dearborn Heights Building Department, and PETER SIMAKAS, individually and in his capacity as Ordinance Officer for the City of Dearborn Heights,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: SILER, COLE, and ROGERS, Circuit Judges.

SILER, Circuit Judge. In this civil rights action arising out of the city's condemnation of plaintiffs' home, individual defendants Edward Opalewski and Peter Simakas take this interlocutory appeal from an order of the district court denying them qualified immunity. We affirm.

Appendix A

BACKGROUND

Ordinance Officer Simakas was contacted in March 1997 by a neighbor of the Fitzpatricks, who were at that time staying at their seasonal home in Florida, regarding broken windows at the Fitzpatricks' home. Simakas and Building Inspector Ken Lamontagne went to the residence, where they confirmed that many windows of the Fitzpatricks' home had been broken, apparently by a fallen tree limb. Curtains hung out of a bedroom window and assorted bedroom articles littered the surrounding grounds. Having determined that no one was home, Lamontagne called a contractor to have the windows boarded and Simakas called the Department of Public Works to have the tree limb removed. Lamontagne decided to tag the Fitzpatricks' home for emergency condemnation, and a condemnation placard signed by Simakas was posted on the Fitzpatricks' home.

After returning from Florida to find their home condemned, the Fitzpatricks attempted to initiate an appeal of the city's condemnation decision. Upon visiting Simakas at the city's building department, the Fitzpatricks were served with a notice that the city intended to demolish their home unless the homeowner paid $200 for an appeal to the Demolition Board of Appeals within 30 days. The letter did not list the building conditions justifying condemnation, nor did the proposed hearing offer an attempt to challenge the condemnation decision itself. Instead, the hearing merely offered a means by which to challenge the findings of an inspection by Opalewski (acquiescence to which was a condition of obtaining the hearing) in which Opalewski listed every "deficiency" the home possessed, even those unrelated to the question of habitability.

This process—standard procedure, as conceded by the mayor—is very different from the one ostensibly prescribed by the controlling city ordinance, § 7-485 (relating to "emergency" condemnations). Under § 7-485, a person contesting an emergency condemnation is entitled to petition the mayor for a hearing, which is to be afforded "as soon as possible." The city has attempted to justify its actions by relying on §§ 7-701 and 7-702, which establish and pertain strictly to the Demolition Board of Appeals. The district court below rejected these justifications, however, and granted the Fitzpatricks' motion for summary judgment on the question of post-deprivation lack of due process.

This appeal deals only with the narrow question of the district court's denial of Opalewski's and Simakas's claim of qualified immunity.

STANDARD OF REVIEW

We review *de novo* a district court's denial of qualified immunity. *Dickerson v. McClellan,* 101 F.3d 1151, 1157 (6th Cir.1996).

DISCUSSION

A qualified immunity analysis requires a two-step process. "As a threshold matter, we must ask whether the record, viewed most favorably to the plaintiff[s], establishes that 'the officer's conduct violated a constitutional right.' " *Cherrington v. Skeeter,* 344 F.3d 631, 636 (6th Cir.2003) (quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001)). "[I]f a violation could be made out on a favorable view of the parties'

submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* (quoting *Saucier,* 533 U.S. at 201).

The district court correctly concluded that the Fitzpatricks suffered a constitutional violation. As it relates to emergency displacements of persons from their homes, due process requires at a minimum timely review of the administrative decision. "[F]undamental fairness requires notice in short order of the right to an administrative hearing, including the manner designated for obtaining timely review." *Flatford v. City of Monroe,* 17 F.3d 162, 169 (6th Cir.1994). Stated generally, there is a requirement of "immediate and meaningful postdeprivation process." *Id.* In the instant case, the Fitzpatricks' postdeprivation process was neither immediate nor meaningful. In fact, because the only hearing obtainable addressed not the city's condemnation decision itself but Opalewski's inspection checklist, the Fitzpatricks in effect received no meaningful postdeprivation process at all.

The right to meaningful postdeprivation process—especially in emergency situations where predeprivation process is all-but-impossible—has been clearly established for some time. *See Parratt v. Taylor,* 451 U.S. 527 (1981); *Flatford,* 17 F.3d 162. "[T]he relevant, dispositive inquiry in determining whether a constitutional right is clearly established is whether it will be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Anderson v. Creighton,* 483 U.S. 635, 640 (1997). A reasonable person would find it objectively unreasonable to require the Fitzpatricks to pay $200 to obtain a hearing to

which they are statutorily entitled, only to deny them in that hearing the opportunity to challenge the condemnation decision. A reasonable person would also find it objectively unreasonable to provide a hearing before the Demolition Board of Appeals when the governing city ordinance plainly provides for a hearing before the mayor.

Because the Fitzpatricks' postdeprivation due process rights were violated (at least, looking at the facts in the light most favorable to the Fitzpatricks), and because those rights were clearly established, Opalewski and Simakas are not entitled to qualified immunity.

AFFIRMED.

Appendix A

ROGERS, Circuit Judge, concurring in part and dissenting in part. In this case, the district court found that Director Opalewski and ordinance officer Simakas were entitled to qualified immunity for their pre-condemnation actions, but denied them qualified immunity for flaws in the post-condemnation administrative procedures. Such a case comes close to being a paradigm case for qualified immunity.

The core underlying purpose of the official immunity doctrines is to encourage the vigorous enforcement of the law. *See Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir.1949) (Learned Hand, J.). Vigorous enforcement of city procedures will certainly be deterred if officials may be subjected to individual capacity civil suits based on flaws in post hoc administrative procedures available to challenge their actions. Only in situations where the official is himself the person who denies the legally-required post hoc procedures is official immunity arguably not applicable. *See Flatford v. City of Monroe,* 17 F.3d 162, 169 (6th Cir.1994) (defendant, the city's Director of Building and Safety, did not give adequate notice of available post-condemnation procedures); *but see McGee v. Bauer,* 956 F.2d 730 (7th Cir.1992) (holding that the ordinary building inspector who deemed a house uninhabitable was entitled to qualified immunity from a suit by the plaintiff alleging that the building inspector had failed to give adequate notice of the post-deprivation proceedings). In *Flatford,* the court noted that the individual defendant director was "not merely a building inspector but the highest official in the City's Building Safety Department, vested with statutory duties of commencing proceedings against those responsible for dangerous structures." *Flatford,* 17 F.3d at 169 n. 7.

In the instant case, there is not sufficient evidence that the asserted flaws in the post-condemnation procedure can be attributed to Simakas. Simakas, an ordinance officer, did not have the statutory authority to order the Fitzpatricks' house condemned and was not responsible for the post-condemnation procedures that were in place. The simple act of informing the plaintiffs of the fee and the time of the next Demolition Board of Appeals meeting was not necessarily unreasonable and did not deny the plaintiffs a constitutionally valid post-condemnation procedure. The plaintiffs have not presented evidence that Simakas was responsible for any of the appeals procedures that the district court determined clearly violated the plaintiffs' due process rights. Simakas should therefore be immune from the suit because he simply informed the Fitzpatricks of the post-condemnation proceedings, even if these proceedings were constitutionally deficient. There is insufficient evidence that Simakas had power to affect the Dearborn Height's condemnation policy. Indeed, the district court noted that it was unclear regarding Simakas's role. I would therefore reverse the denial of qualified immunity as to Simakas.

While the issue is close with respect to Opalewski, there is arguably sufficient evidence for a reasonable juror to conclude that defendant Opalewski was the policy-maker who determined that the post-condemnation procedure would have the legal flaws challenged by plaintiffs. Opalewski, like the defendant in *Flatford,* was the Director of the Department of Building and Engineering. Unlike Simakas, Opalewski did have the authority to condemn buildings. Opalewski also instituted at least one policy that the Fitzpatricks have challenged—the policy of requiring inspections of

condemned houses prior to a hearing and making this inspection report the subject of the hearing. While Opalewski may not have been responsible for every constitutionally deficient procedure in this case, there is sufficient evidence that he was responsible for some of the violations. Thus, the district court correctly denied him qualified immunity. I therefore concur with respect to defendant Opalewski.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JANUARY 24, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 97-73020

Hon. John Corbett O'Meara

RICHARD FITZPATRICK and
DOROTHY FITZPATRICK,

Plaintiffs,

v.

CITY OF DEARBORN HEIGHTS, a municipal corporation, EDWARD D. OPALEWSKI, individually and in his capacity as Director of the City of Dearborn Heights Building Department, and PETER SIMAKAS, individually and in his capacity as Ordinance Officer for the City of Dearborn Heights,

Defendants.

OPINION AND ORDER

Plaintiffs Richard and Dorothy Fitzpatrick live at 26156 Powers Street in Dearborn Heights, Michigan. On March 19, 1997, while the Fitzpatricks were at their seasonal home in

Florida, the City of Dearborn Heights Police Department received a complaint from Peter Orlando, a neighbor of the Fitzpatricks' who reported that the Fitzpatricks' home appeared to have been broken into. According to Mr. Orlando, several windows of the home were broken, some of the curtains were flapping in the wind outside of these windows, and clothing and cans were strewn about outside the home.

When Dearborn Heights police officers arrived at the Fitzpatricks' home, they found it unoccupied and in the condition Mr. Orlando had described. Dearborn Heights Officer Simakas inspected the property and determined that emergency action was necessary to secure the property against threats to public health and safety, pursuant to §§ 7-485 and 7-652 of the City of Dearborn Heights Building Code ("Code"). In accordance with the Code, the home was immediately boarded up and a condemnation placard was posted on it. Notice of the condemnation and intent to demolish the building was sent to the Fitzpatricks by certified mail at the Powers Street address but was returned as not received because the Fitzpatncks were at their seasonal home in Florida. In other words, the City condemned Plaintiffs' house as uninhabitable without prior notice and a hearing.

When they returned to the Powers Street home in the spring of 1997, the Fitzpatricks found the home boarded up and condemned. When they went to the Building Department about this, they were served with the condemnation notice and informed that they could appeal the condemnation decision. Edward Opalewski, Director of the Building and Engineering Department, later agreed to permit the Fitzpatricks' insurer to fix the broken windows and to have

the condemnation placard removed. The City stated that it would waive the condemnation proceedings if the Fitzpatricks consented to a "walk-through" inspection of the home in order to determine whether any structural damage had occurred in the home. Such an inspection is necessary for the City to issue a certificate of occupancy. The Fitzpatricks have refused to permit that inspection, arguing that the "certificate of occupancy" rationale for the inspection should not apply to them because, prior to the condemnation, they were not required to hold a certificate of occupancy. As such, they argue that if the condemnation was unauthorized by law, the condition placed on reentering their home cannot be justified on the basis of the condemnation.

PROCEDURAL BACKGROUND

This case has had a long, procedural history with several visits to the Sixth Circuit. It started on May 28, 1997 when the Fitzpatricks filed a complaint in Wayne County Circuit Court alleging violations of their civil rights and requesting a restraining order permitting them to move back into their home without an inspection. The court denied a restraining order, ordered a show cause hearing on the preliminary injunction, held in abeyance a ruling on the legality of the walkthrough inspection, and ordered the Fitzpatricks to permit the inspection. The Michigan Court of Appeals denied a *mandamus* petition to alter the circuit court's ruling.

The Defendants then removed the case to this court on June 28, 1997, and the Fitzpatricks amended their complaint alleging, *inter alia*, that the City officers had violated 42 U.S.C. §1983 by condemning their home without

pre-deprivation notice and a hearing, thus violating the Fitzpatricks' constitutional right to due process, and that the City's ordinance was unconstitutionally vague. The Fitzpatricks moved for partial summary judgment, but this Court denied that motion on November 18, 1997.

Defendants then moved for dismissal under Fed. R. Civ. P. 12(b)(6), and this Court granted that motion on February 27, 1998. The Sixth Circuit Court of Appeals reversed, holding that the Fitzpatricks had alleged facts sufficient to prove a violation of their constitutional rights, and that a factual question remained as to whether an emergency existed as to empower the City to condemn the home without notice or a hearing. *Fitzpatrick v. Dearborn Heights, et al.*, No. 98-1327, 1999 WL 357756 (6th Cir. May 21, 1999).

On March 28, 2000, Defendants Opalewski and Simakas requested summary judgment on the ground of qualified immunity. After oral argument on June 27, 2000, this Court denied the motion, and Defendants Opalewski and Simakas appealed the denial of qualified immunity to the Sixth Circuit. The Sixth Circuit found that it did not have jurisdiction over the appeal, but wrote an unpublished opinion that clarified the standard for qualified immunity that this Court should apply to this case. *See Fitzpatrick v. Dearborn Heights*, No. 00-1978, 19 Fed. Appx. 261, 2001 WL 1110117 (6th Cir. Sept. 6, 2001). Upon remand, this Court granted the individual Defendants qualified immunity. On February 26, 2002, Plaintiff requested that the Court reconsider whether qualified immunity should be granted to the individual Defendants.

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Upon reconsideration, this Court clarified its earlier ruling and held that the Court would reconsider the grant of qualified immunity on the issue of post-deprivation due process (which had not yet been adequately briefed), but would deny it on the issue of qualified immunity for the condemnation of the home without pre-deprivation notice. Specifically, with respect to the pre-deprivation process, the Court found that the facts leading to the condemnation of the Plaintiffs' home, including the citizen complaint, the damaged physical state of the home and its contents strewn on the lawn, the uninhabited state of the home, and the high level of crime in the surrounding neighborhood, were such that it could not be said that no reasonable officer could conclude that condemnation was appropriate. As such, we held that the broad defense of qualified immunity for the decision to condemn the home without pre-deprivation notice was appropriate, even if the Defendants were mistaken and no real "emergency" existed. At this time, we also allowed some more discovery on whether there was an unconstitutional policy or custom of the City of Dearborn Heights, and denied without prejudice Plaintiff's partial summary judgment motion (filed July 21, 2000) on whether an "emergency" existed on March 19, 1997 and partial summary judgment (filed May 13, 2002) on whether the notice of condemnation was legally inadequate. Incidentally, these two motions have been renewed and are presently before the Court.

The remaining claims are whether the City had an unconstitutional policy or custom pertaining to *both* its pre-deprivation and post-deprivation process for condemnation of houses. As against the individual

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Defendants (who have been granted qualified immunity with respect to any violations of pre-deprivation process), the only outstanding question is whether they should be held individually liable for any violation of post-deprivation process.[1] Defendants have filed their own summary judgment motion arguing that the City did not have an unconstitutional policy concerning pre-deprivation or post-deprivation process and that the individual Defendants who played no role in any alleged violations of post-deprivation process should be entitled to qualified immunity.

Plaintiff has filed four motions for partial summary judgment (two of which are merely renewal motions): (1) Plaintiff's motion for partial summary judgment that ordinance 7-652 is void for vagueness; (2) Plaintiff's renewed motion for partial summary judgment on whether an "emergency" existed on March 19, 1997 (3) Plaintiff's renewed motion for partial summary judgment that the 3/26/97 "notice" was legally insufficient; and (4) Plaintiff's motion for partial summary judgment that the City's post-condemnation procedure violates due process. Thus, there are five summary judgment motions before the Court – one by the Defendants and four by the Plaintiffs. As will be shown, we are really dealing with cross-motions for summary judgment because the issues overlap.

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1. The individual Defendants are being sued in their official and individual capacities. An official capacity suit is really a suit against the City itself. *See Ritchie v. Wickstrom*, 938 F.2d 689, 691 (6th Cir. 1991). Because the City is also being sued, it is not necessary to address the Defendants' potential liability in their official capacities. Such an analysis would overlap with whether the City should be found liable.

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SUMMARY OF DECISION

The City's summary judgment motion is denied. The City's main argument with respect to any unconstitutional policy is that the written procedures for pre-deprivation and post-deprivation process were constitutional and that any lack of enforcement or misapplication by the individual Defendants was an isolated occurrence and not indicative of a flagrant policy by the City. The Court finds that there are material facts at issue whether the City had an unconstitutional policy or custom with respect to the pre-deprivation process. Namely, there are material facts at issue whether there really was an "emergency" justifying a notice-less condemnation of Plaintiffs' house. There are also material facts at issue whether the City routinely condemned houses under the no-notice emergency procedures of § 7-485. In other words, even though the Code as written might be constitutional, there are material facts at issue whether the City had a custom of ignoring its written procedures and condemning all residences first – without notice and without there being a genuine "emergency." In sum, there are material facts at issue whether the City had an unconstitutional practice or custom that was the moving force behind the alleged unconstitutional condemnation of Plaintiffs' house. Similarly, there are material facts in dispute whether there really was a true "emergency" on March 19, 1997. As such, Defendants' summary judgment motion concerning pre-deprivation process and Plaintiffs' summary judgment motion that there was no "emergency" on March 19, 1997 (really cross-motions concerning the legality of the pre-deprivation process) are denied.

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With respect to the issue of post-deprivation process, however, Plaintiffs' summary judgment motion is granted. As a matter of law, the City's procedures for post-deprivation process were wholly inadequate and unconstitutional in several key areas. As a preliminary matter, the City applied part of the Code that had nothing to do with condemnation procedures for post-deprivation process. Specifically, it forced people to appeal to the Demolition Board of Appeals instead of the Zoning Board of Appeals or Building Board of Appeals as required by the Code. In other words, Plaintiffs have submitted compelling (and uncontested) evidence that the individual Defendants as a matter of course applied the wrong part of the Code. Moreover, the City's post-deprivation procedures did not provide Plaintiffs with any notice of what was initially wrong with their residence that prompted the initial "emergency" condemnation. They were forced to appeal (to an agency that was not supposed to deal with appeals for condemnations) without knowing the specific reasons for the condemnation. They were forced to pay $200 to initiate this appeal. Additionally, Plaintiffs were told that the appeal hearing would be waived if they consented to an interior inspection of their home. Then, the appeal agency (in this case, the Demolition Board of Appeals) would decide whether the inspector's report was valid. In other words, as Plaintiffs argue, there was no way to appeal the initial decision to condemn their house (which was incidentally done without any notice as an "emergency"). Any appeal would only consider the inspector's subsequent report and presumably post-hoc rationalization for the initial condemnation.

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Plaintiffs have submitted evidence that the post-deprivation process was unconstitutional Defendants do not address any of the specific constitutional challenges that Plaintiffs make in their brief. In fact, Defendants do not even file a response to Plaintiffs' motion concerning post-deprivation process. Instead, Defendants appear to rely on their own summary judgment motion which only states in general terms that Plaintiffs were afforded post-deprivation process which they declined in favor of filing a lawsuit. At the hearing on January 17, 2003, defense counsel also only repeated in general terms that there was a post-deprivation process that the Plaintiffs refused to undergo. Yet, if the post-deprivation process was unconstitutional (which the Court finds it was), then there is no requirement that Plaintiffs initiate an appeal (which they characterize as a "sham") before filing a claim in federal court for a violation of due process. If there is no pre-deprivation process because of an "emergency," then the post-deprivation process must be "meaningful" and "immediate." On the evidence before this Court, as a matter of law, the post-deprivation process which was afforded the Fitzpatricks was unconstitutional.

In sum, while there are factual issues in dispute concerning the pre-deprivation process afforded the Plaintiffs (namely, whether there really was an "emergency" on March 19, 1997 that prompted the condemning of Plaintiffs' house without prior notice and a hearing and whether the City had an unconstitutional custom of employing its emergency procedures as a matter of course), the Court does not find that there are any material facts in dispute concerning the post-deprivation process, which the Court rules as a matter

of law was unconstitutional. Therefore, Plaintiffs' motion for summary judgment that the City's post-deprivation process was unconstitutional is granted. Accordingly, the City's summary judgment motion with respect to the post-deprivation process is denied.[2]

As for Plaintiffs' remaining two summary judgment motions (that the ordinance 7-652 is void for vagueness and that the notice was legally insufficient), the Court denies them, but for different reasons. Pertaining to the void for vagueness argument, as a matter of law, the Court finds that ordinance 7-652 is not unconstitutionally void. As for the notice being legally insufficient, this issue is already subsumed into the Plaintiffs' other summary judgment motions dealing with whether an "emergency" existed on March 19, 1997 and whether the post-deprivation process was constitutional. Because there are factual issues whether an "emergency" existed, and because no notice is needed under the emergency provisions (7-485), the issue of whether the notice was legally deficient for purposes of pre-deprivation process is really dependant on whether there was an emergency. Similarly, with respect to post-deprivation process, one of the many reasons that the Court finds that the post-deprivation process was constitutionally deficient

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2. The Court also does not grant the individual Defendants qualified immunity with respect to post-deprivation process, because the Court finds that the constitutional infirmities with respect to the post-deprivation process were clearly established. As explained *supra*, however, the individual Defendants have already received qualified immunity with respect to any violations of pre-deprivation process. Therefore, only the City remains liable for any pre-deprivation process for having an alleged unconstitutional policy or custom.

is the lack of notice of what were the reasons justifying the initial condemnation. Thus, because the notice issue is addressed in the other two summary judgment motions, it is moot to address it in a separate summary judgment motion. Stated differently, the Court is unsure what Plaintiffs add with this motion, because its arguments are already incorporated in Plaintiffs' other briefs.

Finally, because the Court has held that the City's post-deprivation process was unconstitutional as a matter of law, there is no need to have a trial on whether the pre-deprivation process was constitutional (i.e. whether there really was an "emergency" that justified the condemning of the Fitzpatricks' residence without prior notice and a hearing and whether the City had an unconstitutional policy or custom of routinely applying its emergency provisions for all condemnations). Because the post-deprivation process was unconstitutional as a matter of law; the only remaining issue for a jury is damages.[3]

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3. Because we found that the post-deprivation process was unconstitutional as a matter of law, Plaintiffs' counsel at the hearing concurred that the only remaining issue is damages and that there is no need to have a jury determine whether the pre-deprivation process afforded the Plaintiffs was constitutional. Because the law allows the City to condemn a house as uninhabitable without pre-deprivation notice and a hearing only in emergencies if there is immediate and meaningful post-deprivation process, the Court finds that the due process inquiry is really one question, albeit with two sides (pre-deprivation process and post-deprivation process). If the post-deprivation process is lacking, then this infects the entire due process inquiry. Therefore, by holding that the post-deprivation process was unconstitutional, the City's condemning of the Plaintiffs' house was unconstitutional and the only remaining issue is damages.

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STANDARD OF REVIEW

The usual summary judgment standard applies: a motion under Fed. R. Civ. P. 56 may be granted if the pleadings and all supporting documentation show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. *See Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1245 (6th Cir. 1995). However, the moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The court must view all the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. *See Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984).

Once the moving party discharges its burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. *See* Fed. R. Civ. P. 56(e); *Talley*, 61 F.3d at 1245. To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact. *See Lucas v. Leaseway Multi Transp. Serv., Inc.*, 738 F. Supp. 214, 217 (E.D. Mich. 1990).

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DISCUSSION

Defendants argue that they are entitled to summary judgment that the City did not have an unconstitutional policy or custom with respect to both its pre-deprivation process and post-deprivation process. 42 U.S.C. § 1983 furnishes a substantive right and civil cause of action for deprivation of one's civil rights, including the right to procedural due process guaranteed under the Fourteenth Amendment:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

The Supreme Court has held that municipalities are "persons" subject to suit under § 1983. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978). Municipalities are not, however, liable for every misdeed of their employees and agents. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. Thus, while a municipality may be held liable under 42 U.S.C. § 1983 for a constitutional violation directly attributable to it, § 1983

does not impose vicarious liability on a municipality for the constitutional torts of its employees. *Id.* at 692. In order to state a claim against a city or a county under § 1983, a plaintiff must show that his injury was caused by an unconstitutional "policy" or "custom" of the municipality. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 484 (1986). Furthermore, a municipality may be liable for a policy of "inaction" where there is a "clear and persistent pattern" of constitutional violations; the municipality has notice of the violations; the municipality tacitly approves the unconstitutional conduct; and that the custom was the moving force or causal link in the constitutional deprivation. *Doe v. Claiborne County*, 103 F.3d 495, 508 (6th Cir.1996).

I. Pre-Deprivation Process

With respect to pre-deprivation process, the City argues that the Fitzpatrick's home was condemned pursuant to sections 7-485 and 7-652 of the Code:

Section 7-485 for emergency condemnations states:

> **Emergency Measures**
>
> Whenever the ***Director of Building and Engineering*** or the Fire Chief finds that an emergency exists which requires immediate action to protect the public health, he or she may, without notice or hearing, issue an order reciting the existence of such an emergency and requiring that such action be taken as he or she deems necessary to meet the emergency. Notwithstanding the other

provisions of this article, such order shall be effective immediately. ***Any person to whom such order is directed shall comply immediately, but, upon petition to the mayor, shall be afforded a hearing as soon as possible***. After such hearing, depending on the finding as to whether the provisions of this article and of the rules and regulations adopted pursuant thereto have been complied with, such order shall be continued or may be modified or revoked.

(Emphasis added.)

Section 7-652 of the Ordinance states:

Conditions for Condemnation

Any dwelling or dwelling unit which shall be found to have any of the following defects shall be condemned as unfit for human habitation and shall be so designated and placarded by the Director of Building and Engineering or his or her designee:

(1) One which is so damaged, decayed, dilapidated, unsanitary, unsafe or vermin-infested that it creates a serious hazard to the health or safety of the occupants or of the public.

(2) One which lacks illumination, ventilation or sanitation facilities

> adequate to protect the health or safety of the occupants or of the public.
>
> (3) One which, because of its general condition or location, is unsanitary, or otherwise dangerous, to the health or safety of the occupants or of the public.

Plaintiffs argue that their home was really condemned pursuant to 7-652 (and not 7-485) because there was no "emergency" and that 7-652 is unconstitutional because it does not provide for notice.[4] Defendants counter that 7-652 should be read in conjunction with 7-481 which does provide for notice, and that the Plaintiffs' home was condemned pursuant to the emergency provisions of 7-485 where no notice is needed.[5] Defendants attest that Mr. Simakas determined that emergency action was necessary to secure the Plaintiffs's property against threats to "public safety and health." Thus, according to the City, it properly followed its

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4. In a separate motion, Plaintiffs also argue that 7-652 is unconstitutionally vague. This argument is addressed later in this opinion.

5. While not relevant to the outcome of the motions before the Court, the Court agrees with Defendants that 7-652 should be read in conjunction with 7-481. Therefore, the Court finds that, as written, 7-652 coupled with 7-481 is constitutional. Nonetheless, the remaining issue discussed above in the text is whether the City routinely misapplied the Code and treated all condemnations as emergencies under 7-485.

ordinance for emergency measures (7-485) and there was no due process violation.

The Due Process Clause of the Fourteenth Amendment does not prohibit every deprivation by the state of an individual's life, liberty or property. *Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir. 1994). Only those deprivations carried out without due process are actionable under 42 U.S.C. § 1983. *Id.* Generally, the process that is due before the state may deprive an owner of property includes notice to the owner prior to the deprivation and an opportunity for a pre-deprivation hearing. *Id.* Nonetheless, in *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court explicitly held that in some situations a state may satisfy procedural due process by providing "some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." *Id.* at 539. When the situation necessitates "quick action" by the state or makes efforts to provide a meaningful pre-deprivation process impracticable, the persons acting under state authority may proceed without violating the property owner's rights so long as the state provides an adequate post-deprivation procedure. *Id.* Such a procedure satisfies the "fundamental requirement of due process" – an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 540 (citation omitted).

Thus, the City argues that its procedure for emergencies under 7-485 comports with due process and that the Plaintiffs' home was boarded up and condemned because there was an "emergency." It further argues that there were meaningful post-deprivation procedures that the Plaintiffs voluntarily decided to forgo. (The post-deprivation inquiry is discussed

infra) While it is clear that a city may take quick action without notice and hearing for "emergency" situations (*see Parratt, supra*), there are factual issues which preclude summary judgment for both the Defendants and Plaintiffs concerning pre-deprivation process in the case *sub judice.*

While Defendants maintain that there was an emergency justifying the notice-less condemnation of the Plaintiffs' house,[6] Plaintiffs assert that (1) there was no "emergency" in their case, and that (2) the City had a policy or custom of routinely applying the emergency provisions of 7-485 (when it was really applying the general provisions of 7-652) and condemning houses first without notice. Indeed, Plaintiffs have submitted evidence to support both assertions.

Largely through deposition testimony, they have shown that, once the broken windows on their house were boarded up, there might not have been an emergency justifying the placarding and condemning of their house. Inspector Lamontagne, who inspected their residence, testified that he expected the boarding to make the Fitzpatrick home secure. Inspector Lamontagne also admitted that he could not remember a building condition at the home that would put anyone in immediate danger pending a hearing, and, in any event, he admitted that he did not have the authority to issue an order under sec. 7-485 declaring the existence of an emergency. Ordinance Officer Simakas who saw the home on March 19, 1997 didn't declare any "emergency" excusing

6. These facts include the citizen complaint, the damaged physical state of the home and its contents strewn on the lawn, the uninhabited state of the home, and the high level of crime in the surrounding area.

notice. In fact, as Plaintiffs point out, sec. 7-485 requires that either Director Opalewski or the Fire Chief determine that an "emergency" exists and that an emergency order should issue. Yet, Director Opalewski testified that he did not see the Fitzpatrick home on the date of condemnation, and he does not even remember discussing with the inspector the reasons for the condemnation. Furthermore, the City has been unable to produce any emergency order in the file for the Fitzpatrick home. Thus, there is absolutely no documentation confirming an emergency. Therefore, Plaintiffs maintain that the City really condemned their house pursuant to 7-652 and did so unconstitutionally without notice.

Furthermore, Plaintiffs argue that the City did not even follow sec. 7-485 for emergency condemnations. According to 7-485, they were entitled to an immediate hearing before the mayor: "Any person to whom such order is directed shall comply immediately, but, upon petition to the mayor, shall be afforded a hearing as soon as possible." Thus, Plaintiffs – or anyone subject to sec. 7-485 for emergency condemnations without a prior notice and hearing – should have been able to petition the mayor and have a hearing as soon as possible. Plaintiffs explain that, when they went to Mayor Canfield, she knew nothing of the matter and walked them back to the Building Department for the usual procedures dealing with appeals of non-emergencies (Sec. 7656 which refers back to Sec. 7-482). Indeed, the Mayor agreed with her counsel that she did not consider it an appeal of an emergency order. Thus, Plaintiffs have submitted evidence that they were not even entitled to the process that was afforded them in sec. 7-485 for emergencies.

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Moreover, and quite troubling to this Court, is that Plaintiffs have submitted evidence that the usual procedure in the City was to condemn without any notice in advance and that there was no different procedure for perceived "emergencies." Inspector Lamontagne admitted as much in his deposition:

> A. Most of [the houses] that are condemned are condemned under the Emergency Measures Provision. So there would be no paperwork according to the Emergency Measures Provision.
>
> Q. Okay. Let's talk about that. You said most of them are condemned under the Emergency Measures Act. Are some condemned without being done under the Emergency Measures Section?
>
> A. Not that I know of.

(Ex.4 to Plaintiffs' response, p. 73-74) Significantly, Inspector Lamontagne could not identify a single time when he condemned a home without it being an "emergency." (*Id.* at 74.) Furthermore, Mr. Simakas and Mr. Opalewski testified that the usual procedure in the City was to condemn without any notice in advance and that there was no different procedure for perceived "emergencies." (*See* Ex. 1 to Plaintiffs' response, p. 79, 176; Ex. 2, p. 79-80.)

The City counters that, even if there was no emergency in the Plaintiffs' situation and the individual Defendants made a mistake, the City is not vicariously liable for their

negligence. (The Court also has already granted the individual Defendants qualified immunity finding that, independent of whether there actually was an emergency – a factual intensive inquiry – it was reasonable for them to conclude that there was an emergency based on the condition of the house.) In addition, the City argues that a single allegation of misconduct by an employee is insufficient to establish a custom or policy on behalf of a municipality. While this is an accurate statement of the law (*see Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)), in this case, Plaintiffs have submitted enough evidence to show that this was not an isolated occurrence but rather the routine custom or practice of the City. Plaintiffs have submitted evidence of a pattern of misconduct. Because there is evidence of an unconstitutional practice or custom of the City – independent of what the Code actually states – and because there is evidence that there really was not an "emergency" on March 19, 1997, Plaintiffs have submitted enough evidence to establish a material issue of fact of whether the City's alleged custom of routinely condemning houses without notice and a hearing was the "moving force" behind the alleged unconstitutional condemning of their house without prior notice and a hearing. Therefore, with respect to pre-deprivation process, there are serious material facts in dispute which preclude summary judgment for either party. Accordingly, the Court denies Defendants' summary judgment motion and Plaintiffs' renewed motion for partial summary judgment on whether an "emergency" existed on March 19, 1997.

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II. Post-Deprivation Process

As Defendants concede, if there is no pre-deprivation process in this case because of the so-called "emergency," there must be meaningful post-deprivation process. Where a pre-deprivation hearing is impractical and a post-deprivation hearing is meaningful, the State satisfies its constitutional obligations by providing the latter. *Parratt*, 451 U.S. at 541-42. The Sixth Circuit in *Flatford v. City of Monroe*, 17 F.3d 162, 169 (6th Cir. 1994) (emphasis added) noted:

> The requirement of an immediate and meaningful post-deprivation process becomes even more important in view of the license which qualified immunity essentially allows public officials when they make judgments affecting the health and safety of our citizens under perceived exigent circumstances. Even though we recognize that these judgments may be mistaken, the opportunity of an administrative hearing assures that fairness will quickly prevail and that constitutional rights, if mistakenly curtailed, will be immediately restored. ***Without the assurance of immediate review, qualified immunity may be wrongly perceived as an open invitation for public officials to ignore fundamental rights without any fear of censure.***

Defendants argue that, when the Plaintiffs returned in mid-April and noticed their house condemned and boarded up, they immediately went to the Building Department and were handed a condemnation notice, which stated that they

had 30 days to appeal to the Demolition Board of Appeals ("DBA") and pay $200 for this privilege. Defendants explain that Director Opalewski agreed to permit the Plaintiffs' insurer to fix the broken windows and remove the condemnation placard. According to the City, all the Plaintiffs had to do was agree to a walk-through inspection in order for the City to issue a certification of occupancy. Instead, Defendants argue that the Plaintiffs filed a lawsuit instead of pursuing the post-deprivation process that the Defendants had provided them. Defendants further maintain that the Plaintiffs had the right to appeal the order of condemnation and the notice of intent to demolish to DBA pursuant to sections 7-701 and 7-702 of the Code and that if the Plaintiffs were dissatisfied with the final decision of the DBA, they could appeal to the state circuit courts.

Plaintiffs argue that sections 7-701 and 7-702 are not the correct sections of the Code for appealing a condemnation of a residence and, in any event, are unconstitutional. Plaintiffs explain that neither the placard at the house nor the post-condemnation notice advises the homeowner of the building conditions allegedly at issue; the homeowner has to come to the Building Department to be told orally. Plaintiffs maintain that when they came to City Hall, they were directed to see Mr. Simakas who yelled at them and urged them to sell their home. According to Plaintiffs, he would not make an appointment for them to see Director Opalewski. Plaintiffs attest that Mr. Simakas also advised them that a $200 appeal payment was required in advance and that the hearing would be scheduled at the DBA's next monthly meeting, two or three weeks away. Yet, as Plaintiffs point out, pursuant to 7-485 for emergency condemnations

– which the Plaintiffs' condemnation was purportedly done under- the Fitzpatricks had a right to complain to the mayor about the emergency condemnation and have an immediate hearing on the matter. After the Plaintiffs tried to see the mayor, she sent them back to Mr. Simakas who scolded them for approaching the mayor.

The City vehemently maintains the Plaintiffs should have followed the appeal procedures set forth in sections 7-701 and 7-702 of the Code which provided meaningful and immediate post-deprivation process. Yet, as pointed out by Plaintiffs, these sections set up a Demolition Board of Appeals and describe how to appeal from its rulings. Significantly, Sec. 7-701 does not permit appeal of condemnations to that board, nor does it set any standard by which the DBA is to exercise any authority. Plaintiffs attest that the process is supposed to be that of Sec. 7-656,[7] which directs appeals of condemnations to the Zoning Board of

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7. Ordinance 7-656 states (emphasis added):

> "Any person affected by any notice or order relating to the ***condemning and placarding of a dwelling or*** dwelling unit as unfit for human habitation may request and shall be granted a hearing on the matter before the ***zoning or building board of appeals***, under the procedure set forth in section 7-482.
>
> In pertinent part, 7-482 requires that there be hearing before the ZBA or BBA within 10 days after the appeal is filed. Significantly, it does not mention the DBA.

Appeals ("ZBA") or Building Board of Appeals ("BBA"), with the standards of 7-482.[8] This does appear to be the case, at least for appeals of condemnations pursuant to 7-652. Such a hearing is to be held within 10 days of request and a petitioner is to be given an opportunity to show cause why "such notice" for a condemnation should be modified or withdrawn.

As Plaintiffs attest, the City did not offer such a hearing to them. Instead, it offered to charge them $200[9] in advance to "appeal" unknown and unstated reasons for the City declaring their home "uninhabitable." Significantly, the Plaintiffs were given no reasons that their house was condemned. Instead, they were offered a hearing three weeks away in front of the DBA; they were not offered an immediate hearing in front of the mayor pursuant to 7-485 nor a hearing in 10 days in front of the ZBA or BBA pursuant to 7-656. Mayor Canfield even admitted that for years the City had ignored sec. 7-656's requirement that condemnation appeals be heard by the BBA or ZBA. (*See* Canfield dep. attached as Ex. 12 to Pl.'s motion that the City's post-condemnation procedures violates due process, pp. 21-22.)

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8. According to the Code – which clearly was not enforced as written – it appears that for emergencies pursuant to 7-485, an individual was supposed to be able to see the mayor for an immediate hearing. For regular appeals (when a house is condemned pursuant to 7-652 and ostensibly given notice and a pre-deprivation hearing), appeals are supposed to be pursuant to 7656 and 7-482. Sections 7-701 and 702 have nothing to do with condemnation appeals.

9. Plaintiffs were required to pay $200 within 30 days to get an appeal before the DBA.

Furthermore, the hearing pursuant to 7-702 in front of the DBA would have included Inspector Lamontagne, the very man who made the initial decision to condemn the house – purportedly because of an emergency. There was no requirement that he recuse himself. In other words, the person who made the initial decision to condemn also played a role in its appeal. In addition – and what is most troubling about these post-deprivation procedures – is that the Plaintiffs were told that the hearing before the DBA would be waived if they permitted a post-hoc inspection of their residence to find anything the City wanted them to "fix," regardless of whether it had anything to do with the initial condemnation. Then, if the Plaintiffs disagreed with the report, they could have the hearing before the DBA which would review the subsequent inspection report. In other words, there was no appeal of the initial decision to condemn the house. (And, significantly, the Plaintiffs had not been afforded any pre-deprivation process because of the purported emergency.) Thus, in essence, had the Plaintiffs complied with the so-called post-deprivation process provided by Defendants, there never would have been any hearing or review of the initial reason to condemn the house. While the Fitzpatricks probably would have gotten their house back without a five year lawsuit, the post-deprivation process was clearly unconstitutional as a matter of law because it was neither "immediate" nor "meaningful."

Clearly, the post-deprivation hearing was not immediate where the Plaintiffs had to wait two or three weeks and pay a $200 fee in advance. As Plaintiffs point out, for someone who could not afford the $200 within 30 days, that individual would not be able to appeal the condemnation of his or her

house that was – for all practical purposes at least in the City of Dearborn – probably condemned without a prior hearing as an "emergency." The Court finds that the right to live in one's home is fundamental and that any meaningful post-deprivation process (especially where an individual has not been given any pre-deprivation process) cannot require a $200 fee. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that some hearings or court proceedings are so fundamental to ordered liberty that a government cannot deny them to a citizen who cannot pay the fee).

Furthermore, once a citizen had paid the $200 and filed an application for a hearing, the hearing would not be scheduled until after the individual permitted Director Opalewski or other DBA members to enter the home for a full interior inspection. Besides the obvious Fourth Amendment problems with this approach (discussed *infra*), Plaintiffs have submitted evidence that, when there was no pre-condemnation notice or hearing (as in this case), and the homeowner demanded a post-condemnation hearing, the average wait for a hearing was 109 days from condemnation. (*See* chart on page 4 of Plaintiffs' motion that post-condemnation procedure violates due process and Ex. 9.) Defendants do not challenge these factual assertions. As a matter of law, in this context, the Court finds that such a long wait for a post-deprivation hearing when there has been no pre-deprivation hearing cannot be considered immediate.

Furthermore, the post-deprivation process was not meaningful. The City never specified the building conditions

at issue;[10] it demanded an interior inspection prior to the hearing and (thus a waiver of Fourth and Fourteenth Amendment rights in exchange for the hearing)[11]; the hearing

10. In 1992, Judge Rashid of the Wayne County Circuit Court voided a demolition decision of the City in part because the City had failed to identify in advance of the hearing the specific conditions causing the violation:

> In order to be able to properly prepare for any subsequent hearing, it is necessary for the property owner to be advised of the specific violations claimed by the City. It is insufficient to simply indicate in general terms, as the City has done in this instance, that various code sections may be violated, particularly since numerous possibilities exist in terms of the number of violations which may be claimed under any particular section of the code. The City must identify the condition which causes the violation. ***To hold otherwise would require the homeowner to appear at a hearing unprepared to respond to specific allegations since no specific allegations were provided to the homeowner.***

Nagy v. City of Dearborn Heights, Wayne County Circuit Court, Case # 92-208769-CH (Opinion and Order, July 27, 1992, p. 5) (emphasis added). Thus, here too, the Plaintiffs should have been given the reasons for the condemnation of their house as unhabitable before any appeal.

11. As the Plaintiffs point out, requiring a homeowner to voluntarily forgo his Fourth Amendment rights in order to protect his Fifth Amendment due process rights implicates the "doctrine of unconstitutional conditions." In *Dolan v. City of Tigard*, 512 U.S.

(Cont'd)

was to be held by the wrong board (the DBA instead of the BBA or ZBA); the DBA did not have standards of review and, most significantly, the DBA never actually reviewed the propriety of the initial condemnation – only the subsequent inspection report.[12] Furthermore, the same individual who made the initial decision to condemn without notice played a role in its subsequent appeal.[13]

(Cont'd)
374 (1994), the Court held that it is unconstitutional to condition the grant of a governmental benefit on the requirement that the citizen give up a constitutional right. Here, as Plaintiffs emphasize, they are not seeking a governmental benefit – they are instead demanding a constitutional right of due process before their home is condemned and rendered uninhabitable. It seems problematic to this Court to force the citizens of Dearborn Heights to choose between their Fourth Amendment and Fifth Amendment rights in this context. The City is essentially requiring the homeowners to forfeit Fourth Amendment rights and allow a search of their house in order to get the hearing that due process requires the City to hold. Such a practice especially in this context is unconstitutional.

12. As recently as this August, the Sixth Circuit has commented that a post-condemnation inspection cannot be used as rationalization for the condemnation itself. *See Sell v. City of Columbus*, No. 00-4467, 2002 WL 2027113, fn 3 (6th Cir. Aug. 26, 2002) ("Cross's extensive inspection of the house *after* the plaintiffs had been evicted could not serve as a post-hoc rationalization for the emergency order to vacate, because these conditions were not apparent at the time the order was given.").

13. It is axiomatic that due process demands a hearing in front of an impartial factfinder. *See Withrow v. Larkin*, 421 U.S. 35, 58, fn 25 (1975) (noting that while some investigative and adjudicative functions could be combined, "when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review.").

Appendix B

Surprisingly, the City does very little to justify its post-deprivation procedures. It does not file a response to the Plaintiffs' summary judgment motion that its post-deprivation process was unconstitutional, instead relying on its own summary judgment motion. Yet, in its own motion, it does not address the specific constitutional deficiencies that the Plaintiffs raise, namely: (1) Why it applied as a matter of course 7-701 and 7-702 of the Code dealing with the DBA when the DBA was not authorized to review condemnation decisions? Relatedly, why didn't the City instead apply 7-656 or even 7-485 of the Code which specifically provided for appeals of condemnation decisions?; (2) Why did Plaintiffs receive no notice of the specific problems with their house *before* any hearing, especially after Judge Rashid's warning that people should have the opportunity to prepare in advance of a hearing?; (3) Why, in essence, was there no review of the initial reason to condemn the house and only the subsequent report? (4) Why were the Plaintiffs forced to allow an inspection of their home – in other words, forgo their Fourth Amendment rights – in order to appeal the initial decision to condemn their house, a decision that itself was made without pre-deprivation process because of a purported emergency?; (5) Why was inspector Lamontagne – who made the initial decision to condemn the house – on the appeal board (i.e. the DBA) and not required to recuse himself?

At the hearing on January 17, 2003, defense counsel failed to address these specific deficiencies and instead cited the case in his brief, *Herwins v. City of Revere*, 163 F.3d 15 (1st Cir. 1998), which merely held that Plaintiffs cannot forgo an adequate post-deprivation process in lieu of suing in court. Yet, in Herwins, the Court found that the post-deprivation

process afforded the landlord was, indeed, an adequate post-deprivation remedy. Importantly, the post-deprivation process in Herwins was not alleged to have the same constitutional infirmities that the Plaintiffs raise in the case *sub judice*. As the nonmoving party, Defendants were required to rebut Plaintiffs' evidence of the unconstitutional post-deprivation procedures afforded the Fitzpatricks. Because Plaintiffs have submitted evidence of the unconstitutional post-deprivation process, and because Defendants have refused to address any of these specific deficiencies (in their briefs or at the hearing), Plaintiffs are entitled to summary judgment.

Finally, the City asserts that neither Mr. Opalewski nor Mr. Simakas were involved in any post-condemnation procedure, and therefore both should have qualified immunity concerning any post-condemnation violation of due process. The doctrine of qualified immunity shields government officials performing discretionary functions from civil damages liability as long as their actions are reasonable in light of the legal rules that were clearly established at the time of their conduct. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Although the reasonableness of an official's action turns on objective factors, the Supreme Court requires a fact-specific inquiry to determine whether officials would reasonably, even if mistakenly, believe their actions are lawful. *Anderson v. Creighton,* 483 U.S. 635, 639 (1987).

To withstand a motion for summary judgment on the ground of qualified immunity, the plaintiff must establish: (1) an alleged violation which implicates clearly established law, and (2) facts sufficient to create a genuine issue that the

alleged violation of that law actually occurred. *Russo v. City of Cincinnati*, 953 F.2d 1036, 1043 (6th Cir.1992). Here, as explained supra, the Court finds that Defendants violated Plaintiffs' procedural due process rights by not providing them an immediate and meaningful post-condemnation procedure. Thus, the only remaining question is whether Plaintiffs' due process rights in having meaningful post-condemnation process was "clearly established." The Court finds that, since *Parratt v. Taylor*, 451 U.S. 527 (1981), it has been clearly established that individuals must be afforded meaningful post-deprivation process if their residence is condemned as uninhabitable without pre-deprivation notice or hearing. Further, the Court finds that it was not reasonable for Director Opalewski nor Officer Simakas to believe that the post-deprivation process afforded the Fitzpatricks was reasonable.

While Director Opalewski may not have been a policymaker for the City *see Antonian v. City of Dearborn Heights*, 224 F. Supp.2d 1129 (E.D. Mich. 2002), he did institute the policy of demanding a post-condemnation inspection that could be appealed to the DBA. In fact, as Plaintiffs explain, he was the one who would conduct the post-condemnation inspection, make up a list of "deficiencies" that may or may not have had anything to do with habitability, and present it to the DBA. The Court finds that any reasonable official would have known that requiring $200 for a hearing in front of the wrong board (the DBA instead of the BBA or ZBA) weeks or even months after an "emergency" eviction (instead of immediately with the mayor or in 10 days) was not meaningful post-deprivation process, especially where the Plaintiffs never were given the

opportunity to have the initial condemnation decision reviewed nor even given a list of reasons for the condemnation to prepare for any appeal. The Court wants to emphasize that requiring Plaintiffs to appeal to the DBA explicitly violated Sec. 7-656 and 7-485, and the mayor admitted that the City routinely had appeals for condemnations go through the DBA pursuant to 7-701 and 7-702. Hence, the Court does not believe the Director Opalewski should be granted qualified immunity with respect to his role concerning the post-deprivation process afforded the Plaintiffs.

Officer Simakas is a little trickier. It is not entirely clear the role Officer Simakas played in depriving Plaintiffs of post-condemnation process. While Officer Simakas placarded the Plaintiffs' house on March 19, 1997 without a pre-deprivation hearing ostensibly because it was an "emergency," the Court is not sure that he played any significant role in providing Plaintiffs with post-condemnation process. Plaintiffs allege that Officer Simakas yelled at them when they went to the Building Department and admonished them for speaking with the mayor. This alone would probably not be enough to hold him individually liable under Section 1983, which requires personal involvement.[14] Yet, Plaintiffs also attest that Mr. Simakas advised them that a $200 appeal payment was required in advance and that the hearing would be scheduled

14. This is a different argument than qualified immunity. Defendants argue that Officer Simakas and Director Opalewski should not be held liable because they were not personally involved with any post-deprivation process. If true, this would be a defense that they did not have personal involvement as required under Section 1983. This has nothing to do with qualified immunity, however.

at the DBA's next monthly meeting, which was two or three weeks away. This allegation (which went unchallenged by Defendants) shows that Mr. Simakas did play a role in depriving Plaintiffs of immediate post-condemnation process – a right that has been clearly established for decades. While a close call, the Court denies Officer Simakas qualified immunity for his role in the unconstitutional post-condemnation process afforded the Fitzpatricks.

In sum, Plaintiffs' motion for summary judgment that the post-deprivation procedure was unconstitutional is granted. Thus, this issue should go the jury on damages only and Plaintiffs should get their house back.

III. Section 7-652 as Void for Vagueness

Plaintiffs also argue that ordinance 7-652 is void for vagueness as a matter of law. Therefore, Plaintiffs argue that the action taken against them on that ordinance is void *ab initio*.

The Ordinance 7-652 reads:

> Any dwelling or dwelling unit which shall be found to have any of the following defects shall be condemned as unfit for human habitation and shall be so designated and placarded by the director of building and engineering or his or her designee:
>
> (1) One which is so damaged, decayed, dilapidated, unsanitary, unsafe or vermin-infested

> that it creates a serious hazard to the health or safety of the occupants or of the public.
>
> (2) One which lacks illumination, ventilation or sanitation facilities adequate to protect the health or safety of the occupants or of the public.
>
> (3) One which, because of its general condition or location, is unsanitary, or otherwise dangerous, to the health or safety of the occupants or of the public.

Plaintiffs argue that the ordinance does not reasonably inform citizens of the building conditions that will be deemed to warrant condemnation and that the enforcers of the ordinance (i.e. the inspectors) will use arbitrary, subjective standards.

The Due Process Clauses of the Fifth and Fourteenth Amendments provide the constitutional foundation for the void-for-vagueness doctrine. *See United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir.1996). A vague ordinance violates the Constitution in two significant respects: such an ordinance fails, (1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct, and (2) to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. *See Kolender v. Lawson,* 461 U.S. 352, 357 (1983). The second prong -providing minimal guidelines to govern the conduct of law enforcement – constitutes the more important aspect of the vagueness doctrine. *Id.* at 358. "This reflects the common sense understanding that the average citizen does not read,

at his leisure, every federal, state, and local statute to which he is subject." *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995).

Defendants argue that the words which Plaintiffs argue are impermissible vague, such as "serious risk," "adequate" and "otherwise dangerous," should be interpreted in the context of the housing codes which the Code adopts by reference. Furthermore, 7-652 uses descriptions such as "damaged, decayed, dilapidated, unsanitary, unsafe or vermin infested" to provide more guidance. When the common meaning of a word provides both adequate notice of the conduct prohibited and standards for enforcement, a statute's failure to define a term will not render the statute unconstitutionally void for vagueness. *United States. v. Haun*, 90 F.3d at 101. Each party cites abundant cases which they say support their respective positions.

The Court has considered the numerous cases cited by both parties and does not summarize them here. The Court finds that the cases more on point suggest that the statute at issue here is not impermissibly vague. *See, e.g. DePaul v. Kauffman*, 441 Pa. 386, 272 A.2d 500 (1971) (finding that the Philadelphia housing code which defines as unfit for human habitation any dwelling which "constitutes a serious hazard to the health or safety of the occupants or to the public because it is dilapidated, unsanitary, vermin infested or lacking in the facilities and equipment required by this Title" to be adequate notice and not unconstitutional). Therefore, Plaintiffs' summary judgment motion that the statute is void for vagueness is denied. (This denial has no practical significance for Plaintiffs, however, because the

post-condemnation process was unconstitutional and they are entitled to damages and the return of their house.)

IV. Whether the 3/26/97 Was Legally Insufficient

Here, Plaintiffs argue that the notice that they were sent by the City on March 26, 1997 was legally insufficient because it did not list the building conditions that were deemed to render the home uninhabitable. (The notice is attached as Exhibit 2 to Plaintiffs' motion.) Plaintiffs argue that, on May 10, 2001, Judge Zatkoff in *Heins v. City of Dearborn Heights*, Eastern District of Michigan Docket # 00-cv-72969-DT (attached as Exhibit 4 to Plaintiffs' motion) held as a matter of law that the notice provision sent by the City of Dearborn under 7-481 did not comport with due process because it did not contain "a detailed statement of the specific violations and the remedial action required." Because the notice sent to Heins was the same notice sent to Plaintiffs here, Plaintiffs argue that as a matter of offensive collateral estoppel (or issue preclusion) that the issue cannot be relitigated here. They argue that the City is estopped from denying that the notice it gave the Fitzpatncks was legally insufficient.

While at first blush this argument seems convincing, in the Plaintiffs' case here, the City has always held that it was condemning their house under the emergency provisions of 7-485 which does not require notice. In *Heins*, the City was not using the emergency provision of 7-485. While Plaintiffs argue that there was not an "emergency" in their case, and that they should have been given notice under 7-481, this argument has already been addressed in Plaintiffs' motion

for partial summary judgment that there was not an "emergency' on March 19, 1997. In other words, as concerning pre-deprivation process, whether the "notice" was legally sufficient is subsumed into Plaintiffs' other argument about whether there really was an "emergency." (If there was an "emergency," then the notice provisions of 7-481 are inapplicable.) Nonetheless. with respect to the question of post-deprivation process, Judge Zatkoff's opinion is helpful in what it states:

> Further, not only did inadequate notice fail to specify why the dwelling at issue was being condemned and demolished, Defendant also charged Plaintiff $200 before he could ever be granted a hearing to appeal Defendant's decision, based on undisclosed reasons, to demolish the dwelling. These shortcomings by Defendant are deplorable considering the gravity of the consequences of its decision: the demolition of a residential dwelling. Therefore, the Court holds that Defendant's notice to Plaintiff did not comply with the requirements contained in section 7-481 (a) of the Dearborn Heights Code.

(*See* Judge Zatkoff's unpublished Opinion and Order of May 10, 2001, attached as Exhibit 4 to Plaintiffs' motion, p. 17.) Thus, with respect to post-deprivation process, Judge Zatkoff's opinion is informative. If he found that the notice is legally insufficient with respect to pre-deprivation process, then an argument can be made that it is legally insufficient with respect to post-deprivation process, especially where an individual is not given any pre-deprivation process because

of an "emergency." While this Court will not employ the doctrine of offensive collateral estoppel because of the different set of facts, Judge Zatkoff's opinion is helpful for Plaintiffs by highlighting the infirmities in the City's appeal process. Yet, this Court has already granted Plaintiffs' summary judgment motion that the post-condemnation procedure was unconstitutional, in part because Plaintiffs were not provided sufficient notice of what was initially wrong with their house that justified the condemnation. Hence, this separate motion about the inadequate notice is redundant and therefore denied.

Appendix B

ORDER

It is hereby **ORDERED** that:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is **DENIED**;

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY. JUDGMENT THAT ORDINANCE 7-652 IS VOID FOR VAGUENESS is **DENIED**;

PLAINTIFFS' RENEWED MOTION FOR PARTIAL SAY JUDGMENT ON WHETHER AN "EMERGENCY" EXISTED ON MARCH 19, 1997 is **DENIED**;

PLAINTIFFS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT THAT THE 3/26/97 "NOTICE" WAS LEGALLY INSUFFICIENT is DENIED;

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT THAT THE CITY'S POST-CONDEMNATION PROCEDURE VIOLATES DUE PROCESS is **GRANTED**.

A trial date should be scheduled for damages only.

s/ John Corbett O'Meara

John Corbett O'Meara
United States District Judge

Date: January 22, 2003

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 17, 2004

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-1180

RICHARD FITZPATRICK, ET AL.,

Plaintiffs-Appellees,

v.

CITY OF DEARBORN HEIGHTS,
A MUNICIPAL CORPORATION, ET AL.,

Defendants-Appellants.

ORDER

BEFORE: SILER, COLE, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

(2)

No. 04-760

Supreme Court, U.S.
FILED
JAN 5 - 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

EDWARD D. OPALEWSKI and PETER SIMAKAS,

Petitioners,

v.

RICHARD and DOROTHY FITZPATRICK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Sixth Circuit err in holding that when pre-deprivation process is not required before barring citizens from their homes, the post-deprivation process must be constitutionally adequate under existing due process standards regardless of whether that process provides for judicial review?

II. Did the Sixth Circuit err in affirming the District Court's denial of qualified immunity to Petitioners when they failed to appeal aspects of the post-deprivation process found to violate due process?

III. Should Respondents receive double costs and attorney fees as damages for the delay of their trial?

LIST OF PARTIES

Petitioners/Defendants are Edward D. Opalewski and Peter Simakas ("the Officials"). Respondents/Plaintiffs are Richard and Dorothy Fitzpatrick. The City of Dearborn Heights is a Defendant, but as the interlocutory appeal was based on qualified immunity (which does not apply to municipalities), it is not a party to this Petition.

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STATEMENT OF JURISDICTION

The Fitzpatricks concur with the Officials' Statement of Jurisdiction, but deny that the Court should exercise it.

CONSTITUTION, STATUTORY AND ORDINANCE PROVISIONS

The Fitzpatricks concur with the constitutional and ordinance provisions the Officials cited, but note that they omitted Ordinance 7-656:

> Any person affected by any notice or order relating to the condemning and placarding of a dwelling or dwelling unit as unfit for human habitation may request and shall be granted a hearing on the matter before the zoning or building board of appeals, under the procedure set forth in section 7-482.

STATEMENT OF THE CASE

After the Fitzpatricks returned from their annual Florida trip in April 1997, they discovered that the City had condemned their home as "uninhabitable" without notice and without a list of the conditions allegedly making the home "uninhabitable." In May 1997, after discussions with the City failed to resolve the problem, they filed suit in state court for a temporary restraining order to get back into their home. In June, they moved for an emergency writ of mandate, and the Michigan Court of Appeals stayed the case. At that point, the Defendants removed the case to the Eastern District of Michigan, where the case started over.

The District Court denied a motion for preliminary injunction, and the Fitzpatricks' motion for partial summary judgment. By December 1997, Defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted. Before Defendants answered the discovery served, the District Court dismissed the case on February 27, 1998.

On May 21, 1999, the Sixth Circuit reversed and remanded with an instruction that the District Court could not dismiss the case without a factual finding as to whether there was an emergency excusing pre-deprivation process.

Upon remand, the Fitzpatricks pressed their discovery designed to show the pattern and practice of illegal condemnations. On March 17, 2000 the Fitzpatricks gained an order compelling the City to produce records of other condemnation; the Defendants filed their motion for summary judgment eleven days later without producing the documents. At the June 27, 1999 hearing, the District Court stated that it would deny the motion due to a genuine issue of material fact, but declined to review the discovery taken between the time of the briefs and the time of the hearing. Instead, it invited further motions if the depositions shed further light on the matter. The Fitzpatricks filed their motion for summary judgment in July 2000, based on the documents and depositions. On August 10, 2000 the District Court issued the order denying the Defendants' motion; the Fitzpatricks' motion was argued on September 15, 2000, but was not resolved before the Officials filed an interlocutory appeal of the District Court's August 10, 2000 order.

Defendants sought a stay of proceedings during the interlocutory appeal. The Fitzpatricks opposed any stay. Although the District Court denied a stay, the 6th Circuit stayed the case in January 2001. In that same month, the Fitzpatricks moved to dismiss the appeal for lack of jurisdiction. Although the 6th Circuit denied that motion, it ultimately dismissed the appeal for lack of jurisdiction in September 2001. The Fitzpatricks' motion for costs and attorney fees for a frivolous appeal was denied.

Upon remand, the Defendants did not re-file their motion for summary judgment, but still asked the District Court to grant them qualified immunity. Without a briefing schedule or argument, the District Court did so, via its order of February 8, 2002. In that order, the District Court found "facts" that were disputed, such as the allegations of the physical state of the home, the allegation of contents "strewn on the lawn," and the allegation of high crime in the neighborhood. The Fitzpatricks filed a motion for reconsideration protesting this procedure, noting that the Court had not ruled on their still-pending motion for summary judgment, and pointing out that the Court's February 8 order failed to consider the claim that the post-deprivation process was inadequate. The District Court conceded that the claim for violation of post-deprivation due process should be addressed, and permitted the case to continue.

After completing discovery, the parties filed cross-motions for summary judgment in October, 2002. On January 24, 2003 the District Court ruled that there were genuine issues of material fact as to whether the Fitzpatricks were improperly denied pre-deprivation process, but that there was no genuine issue of material fact that they were denied post-deprivation process. It also denied

the Officials qualified immunity for the post-deprivation due process violations.

In February 2003, the Officials filed a second interlocutory appeal in the Sixth Circuit. The Fitzpatricks moved for certification that the appeal was frivolous, so as to permit trial pending the appeal. The District Court denied the motion, but stated that in view of the age of the case (nearly 6 years), the Fitzpatricks could choose to try the case against the City immediately and risk having to try it a second time against the individual defendants or to wait for the completion of the interlocutory appeal by the individual defendants. The Fitzpatricks chose an immediate trial against the City. Shortly before the trial date in September 2003, the Defendants filed a motion for stay, which was granted. The District Court, meanwhile, had allowed the Fitzpatricks to resume living in their home, but denied a motion for interim costs and attorney fees because a "reasonable" fee could not be determined without a trial on damages.

On July 15, 2004 the Sixth Circuit denied the second interlocutory appeal. It denied the petition for rehearing en banc on September 17, 2004. Upon remand, the District Court scheduled a status conference for November 30, 2004; at this conference, the Officials announced that they were filing a petition for writ of certiorari.

ARGUMENT

A. The Petition Does Not Raise Issues of Peculiar Gravity or General Importance

The Court normally does not issue a writ of certiorari to review an interlocutory order unless it is necessary to

prevent extraordinary inconvenience and embarrassment in the conduct of the case. *American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). Such review is limited to cases "of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 215, 258 (1916). While an appeal of an interlocutory decision concerning qualified immunity was accepted in *Brosseau v. Haugen*, 2004 WL 2847251 (Dec. 13, 2004 decision), the petition was granted only to correct a "clear misapprehension of the qualified immunity standard." No such misapprehension existed here. Nor is this a case in which Defendants raise issues of general importance; rather, it is simply a last-ditch effort to further delay the trial for which the Fizpatricks have waited nearly eight years.

B. There is no Split of Authority to Reconcile

The Defendants have misconstrued *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and its progeny to assert that any post-deprivation process is constitutionally permissible, as long as the decision is reviewable. No Circuit has adopted this unique view, which would radically undermine *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Mathews, supra, is always the touchstone for determining what process is due under any circumstance. The factors to be weighed are 1) the private interest that will be affected by the official action, 2) the risk of erroneous deprivation through the procedures used and the probable value of additional or substitute safeguards, and 3) the Government's interest. *Mathews, supra at* 335. The

Parratt Court applied this test in a very particular setting: a case in which the deprivation could not be predicted. More safeguards could not have addressed the risks when the deprivation could not be anticipated. *Zinermon v. Burch,* 494 U.S. 113, 129-130, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). This explanation confirms that *Parratt, supra,* cannot reasonably be understood as rejecting the *Mathews* factors. Therefore, when pre-deprivation process is not feasible or constitutionally required, post-deprivation process must still comport with due process by procedures that properly balance the *Mathews* factors.

That is why the Courts have been unanimous in stating that post-deprivation *process*, not just post-deprivation decisions, must be "adequate." For example, the Court in *Cohen v. City of Philadelphia,* 736 F.2d 81, 84-86 (3d Cir. 1984) differentiated between inadequate post-deprivation procedures, which would constitute a due process violation, and an erroneous decision made under proper procedures, which would not constitute a due process violation. *Herwins v. City of Revere,* 163 F.3d 15 (1st Cir. 1998) was based on the assumption that the post-deprivation process offered was not procedurally inadequate. Indeed, the Court noted that if it were unfeasible to notice an appeal within the 7-day limit for post-deprivation appeal and the state refused to permit a belated appeal, "this might raise a question whether state remedies were adequate." *Id. at* 20. No Circuit ignores the fairness of post-deprivation procedures, especially when a citizen challenges the procedures themselves.

In determining what constitutes an "adequate" post-deprivation hearing after emergency deprivation of a home, the Sixth Circuit, after considering the *Mathews* factors, stated:

> Here, post-deprivation state tort remedies are neither timely nor sufficiently remedial for emergency evacuees. Fundamental fairness expects more of a state than mere tort remedies where government dispossesses citizens from their homes.
>
> Because in many cases emergency evacuees may determine there is no need for administrative review, we cannot say that an automatic hearing is constitutionally required. However, fundamental fairness requires notice in short order of the right to an administrative hearing, including the manner designated for obtaining timely review. **The requirement of an immediate and meaningful post-deprivation** process becomes even more important in view of the license which qualified immunity essentially allows public officials when they make judgments affecting the health and safety of our citizens under perceived exigent circumstances. Even though we recognize that these judgments may be mistaken, the opportunity of an administrative hearing assures that fairness will quickly prevail and that constitutional rights, if mistakenly curtailed, will be immediately restored. Without the assurance of immediate review, qualified immunity may be wrongly perceived as an open invitation for public officials to ignore fundamental rights without any fear of censure. This is most certainly not our intended message.

Flatford v. City of Monroe, 17 F.3d 162, 169 (6th Cir. 1994) (emphasis added). This rule has served the people of the 6th Circuit well, as evidenced by such cases as *Jones v. City of Youngstown,* 980 F. Supp. 908 (N.D. Ohio 1997); *Mitchell v. City of Cleveland,* 172 F.3d 49 (Table), 1998 WL 898872 (6th Cir. Dec. 17, 1998); *Thomas v. Cohen,* 304 F.3d

563 (6th Cir. 2002); and *Sell v. City of Columbus*, 2002 WL 2027113 (6th Cir. August 26, 2002).

The Officials have not tried to deny that, regardless of any other factors, the actual (as opposed to written) post-deprivation process routinely followed in Dearborn Heights could not have afforded any meaningful hearing at all. *They did not deny that the post-deprivation process sent citizens to the Demolition Board of Appeals ("DBA"), which does not review the reasons for condemnation, nor whether the reasons were correct.* As the District Court said, following the procedure would not have resulted in review of the condemnation decision at all. Thus, regardless of any other factors, the post-deprivation process was inadequate. One of the cases upon which the Officials rely, *Grayden v. Rhodes,* 345 F.3d 1225 (11th Cir. 2003), offered majority and dissenting opinions based on different beliefs about whether the post-deprivation process could, as a matter of law, reverse the decision under review. The majority believed that it could, and declared the post-deprivation process adequate; the dissent believed that it could not, and called the post-deprivation process inadequate. Like the District Court in this case, it was prepared to examine whether a post-deprivation process was "adequate" by examining whether it could actually provide a meaningful review.

The Officials did not deny that the DBA had, as a voting member, the man who made the condemnation decision (which, in accordance with due process, should have been the subject matter of the review). Under one of the very cases upon which the Officials now rely, *Myrick v. City of Dallas,* 810 F.2d 1382 (5th Cir. 1987), the Fifth Circuit examined a post-deprivation process to determine whether its institutional structure made it "inadequate."

Id. at 1387. To do so, the Fifth Circuit applied *Withrow v Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) – the very case the District Court here cited to show that the DBA's structure made it unfair. Indeed, the Officials failed to dispute the fact that during the time the decisionmaker sat on the Board that should have been reviewing his decisions, not one condemnation decision had been reversed.

The Officials did not deny that the Fitzpatricks, like all other Dearborn Heights residents deprived of their homes on an "emergency" basis, did not get a written list of the reasons for the condemnation prior to having to set forth in writing an appeal. They did not deny that no one could get a hearing unless and until they let the City inspect the interior of their homes, thus forcing them to give up their 4th Amendment rights under *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

The cases the Officials cite are part of the uniform federal caselaw that when post-deprivation process is all that is due, that process must be "adequate." "Adequate" post-deprivation process requires that a hearing be "meaningful" under the *Mathews* factors. The Officials have consistently failed to deny that the actual post-deprivation process the City followed would not have reviewed the decision at issue, would have required an appeal without knowing the reasons for the decision being appealed, and would have required forfeiture of 4th Amendment rights as set forth in *Camara, supra*. They did not deny that this implicated the doctrine of unconstitutional conditions. *See Dolan v. Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Under any test, this is not "meaningful"

process. No split of authority exists to render the Officials' novel theory worthy of Supreme Court consideration.

C. There is no Reason to Review the $200 Fee Determination

Regardless of whether the $200 fee had existed, the other defects in the post-deprivation process (which the Officials admitted by failing to contest) render the process constitutionally inadequate. Reaching out to decide a non-dispositive issue on an interlocutory appeal would be a complete waste of resources.

Should the Court consider the petition of this point at all, it should remember that the $200 fee is in the context of disabled retirees (and others) being forced from their homes without notice. Even if people can borrow or raise the $200, the hearing on whether dispossession of a home was warranted must wait until the sum is raised. The District Court correctly found such a delay impermissible, considering the risk of erroneous deprivation and the "historic and continuing importance" of home ownership. *See U.S. v. James Daniel Good Real Property,* 510 U.S. 43, 54, 114 S.Ct. 492, 126 L.Ed.2d 490, 503 (1993).

Every Court that has reviewed the City's refusal to afford any hearing after depriving citizens of their homes unless the citizens pay $200 has deemed the practice fundamentally unfair. Were this not the case, any municipality short on funding could make money by depriving citizens of property without a good reason, and charging them to have the bogus deprivations reversed. The Courts' concern is not unlike that of this Court in *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473, 567-568 (1996), in which the Court stated that the fairness of a fee

depends, in part, on whether the fee is imposed on a claimant trying to pursue something or whether it is imposed on a defendant trying to respond to a government action taken against him. Here, the City takes away citizens' homes without notice, and requires them to pay $200 to get any hearing at all. The unfairness of the fee was so obvious that the mayor herself testified that the Building Department personnel had asked her to discontinue the practice of charging $200 in advance for an appeal of an "emergency" condemnation because it was unfair. If even the Officials themselves have admitted that the charge was fundamentally unfair, and the practice has been stopped, it is a waste of resources to review the practice at the highest level.

D. There is no Reason to Review the Determination that Dearborn Heights Did not Follow Its Own Ordinances

Dearborn Heights' written ordinances provided for speedy hearings, which would actually review the actions appealed. In violation of those post-deprivation processes, the Officials admitted routinely ignoring the ordinances and instead installing the post-deprivation regime that averaged a 109-day wait to a hearing and refused to examine the decision challenged. The Sixth Circuit agreed that this process was neither "immediate" nor "meaningful" as required in *Flatford, supra. Jackson v. Cain*, 864 F.2d 1235, 1251 (5th Cir. 1989) cannot be deemed a contradictory opinion, as it merely held that failure to follow a Department of Corrections procedure did not necessarily constitute a violation of procedural due process, as long as the actual procedures *did* afford due process.

Moreover, the Sixth Circuit addressed the issue of failure to follow the ordinances in the section of its opinion dealing with whether a reasonable officer would be aware that his conduct was unlawful. In that context, the Sixth Circuit noted that the right to meaningful post-deprivation process was well-established. It also stated that it was objectively unreasonable for the officials to fail to follow the ordinances, just as it was objectively unreasonable to demand $200 for a hearing the citizens were entitled by statute to receive. The Officials have presented no split of authority or overwhelming necessity for the Court to reverse the obvious: deliberate replacement of a fair procedure required by ordinance with an unwritten unfair procedure is objectively unreasonable.

E. There is no Reason to Review the Determination that the Post-Deprivation Process did not Afford "Immediate" Review

Again, the Officials misinterpret the facts and the 6th Circuit. While Mr. Simakas predicted that if the Fitzpatricks cooperated, their hearing would take place in two or three weeks, the undisputed facts disclosed that cooperating dispossessed citizens who requested such a hearing waited an average of 109 days for their "immediate" hearings on their homes.

Even if the Officials had been correct about the hearing taking place in two or three weeks, this is not an "immediate" hearing. The requirement for an "immediate" hearing does not arise from the ordinances the Officials routinely ignored. Rather, it arises from the Sixth Circuit's balancing of the *Mathews* factors in *Flatford, supra.* The Officials failed to convince the 6th Circuit to abandon the

Flatford standard, and cite no Circuit that has a substantially different time limitation for hearings after emergency home deprivations. Cases involving job actions are inapposite. The Court has recognized that a citizen's fundamental right to his own home is a right of "historic and continuing significance." No citizen's fundamental liberty to live in his own home should be taken without warning and with a blithe admonition to find other shelter for "two or three weeks" until the City can get around to explaining why the action was taken and holding a hearing to examine the propriety of the action. Dearborn Heights' Ordinances 7-485 and 7-482 recognize this truth, and *Flatford, supra,* strikes the proper balance in enforcing citizens' rights while allowing cities the room to take necessary emergency action.

F. The Court Should Award the Fitzpatricks Damages, Including Double Costs and Attorney Fees, for Defendants Delaying Trial Through a Frivolous Petition

Supreme Court Rule 42.2 provides that the Court may award damages, and single or double costs, for a frivolous petition. This is not a new rule. As early as 1922, the Court held that when an argued position is wholly without merit, and prosecuted solely for delay, the Court may impose damages. *See Wagner Elec. Mfg. Co. v. Lyndon,* 262 U.S. 226, 233, 43 S.Ct. 589, 67 L.Ed. 961, 964-965 (1922).

The Officials know, as they knew in the 6th Circuit appeal, that failure to contest all the ways in which the post-deprivation process was inadequate (and therefore unconstitutional) would doom their appeal to failure because it would not reverse the finding of liability. Moreover, they know now, as they knew in the 6th Circuit

appeal, that a post-deprivation hearing that will not review the condemnation is not "meaningful" under any constitutional standard. Nor have the Officials found any caselaw supporting their argument that any post-deprivation process is "adequate" post-deprivation process. Finally, they have not advanced any reason to depart from the unanimous caselaw requiring post-deprivation process to be fair under the *Mathews* factors. Their petition is therefore frivolous.

This petition is simply the latest in a history of delay against the claims of this disabled retired couple. The fears of the Sixth Circuit in *Yates v. City of Cleveland,* 941 F.2d 444, 448-449 (6th Cir. 1991) have come true in this case, which has become a textbook example of how a municipality, through the improper use of interlocutory appeals, delay of discovery, and frivolous appeals, can delay a section 1983 case for years. The Officials, after the dismissal phase, filed one of their multiple motions for qualified immunity within days of being ordered to produce documents. They appealed the denial of qualified immunity knowing that there was no jurisdiction for it, and sought a stay to do so. After the second appeal, they waited until a scheduled trial date was nearly upon them before seeking another stay pending the third interlocutory appeal. Nor is it an accident that the Fitzpatricks received notice of the planned petition for writ of certiorari only at the scheduling conference at which they expected to get a new trial date. Each motion has been filed at the precise time most likely to extend and delay the proceedings.

The Fitzpatricks have suffered as a result. After having been barred from their home in 1997, they were reduced to living in trailers until the District Court declared the process unconstitutional in 2003, after two

interlocutory appeals. Two years later, they are still awaiting their trial. They suspect the Defendants of trying to delay trial until after the Fitzpatricks die or run completely out of resources or health. In addition, Mrs. Fitzpatrick's elderly father has now died, and she wishes to preserve intact the acreage he owned. Without resolution of this case, she cannot know how much money she has available to preserve the land. The federal courts owe citizens better than an eight-year odyssey in order to vindicate their fundamental rights. This is especially true when government officials unnecessarily delay trials through numerous frivolous appeals.

The Fitzpatricks urge this Honorable Court to send an unequivocal message that frivolous litigation has a price, regardless of whether the entity perpetuating it is a prisoner, a consumer, a corporation, or a government official. They respectfully request damages of double costs and attorney fees.

CONCLUSION

For these reasons, the Fitzpatricks respectfully request the Court to deny the Petition, to declare it frivolous, and to award double costs and attorney fees under Rule 42.2.

Respectfully submitted,

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